

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TAMERA JACKSON)	
Claimant)	
VS.)	
)	Docket No. 1,046,584
ALDERSGATE VILLAGE)	
Respondent)	
AND)	
)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING)	
Insurance Carrier)	

ORDER

Claimant appeals the June 10, 2011, Award of Administrative Law Judge Rebecca A. Sanders (ALJ).

Claimant appeared pro se, as the Motion to Withdraw of George H. Pearson III, her former attorney was granted by the ALJ on July 29, 2011. Respondent and its insurance carrier appeared by their attorney, Michael L. Entz, of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At the oral argument to the Board, the parties stipulated that the Order On Motion To Withdraw And Request For Hearing On Attorney's Lien, granted by the ALJ on July 29, 2011, was proper and neither claimant, nor respondent objected to the result. The Board heard oral argument on September 21, 2011. Gary R. Terrill, of Overland Park, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal.

At oral argument to the Board, an issue arose regarding whether claimant was paid temporary total disability (TTD) during the period of August 17, 2009 through August 23, 2009. By letter dated September 21, 2011, counsel for respondent advised that TTD payments had not been paid during this period. Respondent is ordered to pay the TTD for this period.

ISSUES

1. Did the ALJ err in calculating the payment of disability compensation in a manner whereby the TTD compensation was to be paid prior to the commencement of the payment of permanent partial disability compensation (PPD)? Claimant contends that pursuant to K.S.A. 44-510e(a)(3), which mandates that permanent disability begin immediately after the injury, both TTD and PPD should be paid simultaneously, beginning immediately after the date of accident. Respondent contends that TTD and PPD are not to be paid concurrently as the terms temporary and permanent are opposites and cannot occur at the same time. This is the only issue before the Board at this time.

FINDINGS OF FACT

Claimant originally suffered personal injury by accident on June 16, 2009, while working as a certified nurses aide for respondent. Claimant was provided medical treatment and the matter ultimately went to litigation. On June 10, 2011, an Award was issued by Administrative Law Judge Rebecca A. Sanders, awarding claimant a permanent partial general (work) disability of 77 percent, based upon a 54 percent task loss and a 100 percent wage loss. The Award paid claimant the maximum amount of disability compensation allowable of \$100,000.00 per K.S.A. 44-510f(a)(2). Claimant appealed the matter, originally contending the ALJ had erred in determining the nature and extent of her disability. The confusion created by this appeal was later clarified as claimant advised the Board and opposing counsel that the dispute dealt not with the amount of the award, but rather with the manner in which it was ordered to be paid. Claimant contends that K.S.A. 44-510e mandates the PPD begin immediately after the date of accident, regardless of whether any TTD was or is being paid or is due to be paid.

Respondent contends TTD and PPD are opposites and a claimant cannot qualify for both during the same time periods. Therefore, during the weeks when TTD is paid, claimant would not qualify for PPD.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

¹ K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The Board has addressed this issue in past decisions. In *Johnstone*⁴, the Board held that K.S.A. 44-510e(a) provides that there is a presumption that the permanent partial disability exists immediately after an injury. However, that presumption is rebutted by a finding that claimant is temporarily and totally disabled. Permanent partial disability does not exist during a time when a claimant is temporarily disabled.

The Board finds that the Award of the ALJ ordering TTD to be paid before the payment of PPD is proper and should be affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the respondent is ordered to pay additional TTD benefits at the weekly rate of \$330.56 for the period from August 17, 2009 through August 23, 2009. In all other regards, the Award of the ALJ should be affirmed. Claimant cannot qualify for TTD and PPD during the same periods of time. Claimant's PPD will begin immediately following the conclusion of the payment of TTD.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the respondent shall pay one additional week of TTD benefits at the weekly rate of \$330.56 for the period from August 17, 2009 through August 23, 2009. In all other regards, the Award of Administrative Law Judge Rebecca A. Sanders dated June 10, 2011, should be, and is hereby, affirmed.

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 44-501(a).

⁴ *Johnstone v. Lifeline Systems, Inc.*, No. 1,009,971, 2005 WL 1983397 (WCAB July 12, 2005).

IT IS SO ORDERED.

Dated this ____ day of October, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tamera Jackson, 2105 Pioneer Way, Apt. D, Topeka, KS 66605-1391
Michael L. Entz, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge